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# In the Supreme Court of the United States.

No. 20,034.

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JAMES COFFEY,
Plaintiff in Error,

vs.

THE COUNTY OF HARLAN,
Defendant in Error.

## BRIEF FOR DEFENDANT IN ERROR.

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TRIBUNE PRINTERY, M'COOK, NEBRASKA

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The plaintiff, in this case, asks the court to construe the constitution of the State of Nebraska and the constitutionality of the provisions of the state statute. It cannot be seriously questioned that the state can punish for violations of its laws by forfeiture, fine and imprisonment, or any one or all of them. When the state, by virtue of statute, imposes any one or all of these penalties, the determination of the constitutionality of the statute is exclusively within the courts of the state.

Cooley on Constitutional Limitations, Sec. 39.
Fairfield v. Gallatin County, 100 U. S., 47; 25 L. Ed. 544.
Atlantic, Etc., R. Co. v. Georgia 98 U. S. 359; 25 L. Ed. 185.

The sentance in the case of the State of Nebraska v. Ezra S. Whitney has been passed on in three different cases in the Supreme Court of the state, and the constitutionality of the law which imposes as a penalty a payment on the part of the defendant of twice the amount embezzled has been sustained.

Ezra S. Whitney v. State, 53 Neb. 287-305, 73 N. W. 696.

Harlan County, Appellee v. Ezra S. Whitney, 65 Neb. 105-109, 90 N. W. 993.

John Everson v. State, 66 Neb. 154-159, 92 N. W. 137.

Ezra S. Whitney was convicted of embezzlement in the prosecution, wherein judgment was entered against him, and adjudged to be punished by both fine and imprisonment. If there was any irregularity in the judgment, it should and could have been corrected by error, to the Supreme Court of the State of Nebraska.

I.

AT COMMON LAW, A FINE COULD BE ENFORCED BY LEVY OF EXECUTION AND A SALE OF PROPERTY THEREUNDER. STATUTES PROVIDING FOR THE ISSUANCE OF EXECUTION UPON A FINE ARE DECLARATORY OF THE COMMON LAW.

In the case of Gill v. State, 39 West Va., 479; 20 S. E. 568, it was objected to the validity of an execution issued upon a fine in a misdemeanor case, that it ran against the realty as well as the personalty of the accused, the contention being made that an execution for a fine could not be levied of realty, In discussing the general proposition, the court said:

"When the prosecution for a public offense has ended in a judgment imposing a fine, it is no longer an unascertained penalty or liability, but has become fixed in amount and has become a debt, and that of the highest character—a debt of record, payable instanter—and the lawful process of execution may go upon it at COMMON LAW and under our statute. Rex v. Woolf, 1 Chit. 401, 18 E. C. L. 225, 229, 230; Kane

v. People, 8 Wend. 203; 1 Bish. Cr. Proc. sec. 1304; Code c. 36, sec. 12. The position taken above—that a judgment for a fine is a debt—is not only supported by the cases just cited, but our case of State v. Burkeholder, 30 W. Va., 593; 5 S. E. 439, supports it, as it holds the state, under its claim to a fine, to be a creditor, and the demand such a debt as will authorize the state to appeal to a court of equity to avoid a deed to the prejudice of the state as to its fine. Award of execution is not an integral part of a judgment, as it need not contain it, and such execution as the law points out may issue upon it; and the well considered cases, cited above of Rex v. Woolf and Kane v. People, holds that by common law, on a judgment for a fine, a writ of capias ad satisfaciendum, to take the body or of levari facias, to take the goods and the issues of the whole land of the defendant, could be issued, just the same as on a judgment for a debt; and it seems to me that our legislation does not intend to deprive the state of the right to go against the land, given by the common law and delay its steps in collection of money due the public treasury by compelling it to resort to chancery to enforce its recovery."

"A case then presents itself where a judgment of both imprisonment and fine stands against the defendant, and in such a case may the fine be collected by a forced sale and execution? The statute expressly authorizes a judgment of both imprisonment and fine, and, if in such a case the fine may not be collected by levy of execution and sale, it cannot be collected at all, for it is not probable that a defendant will voluntarily pay a fine in the absence of any penalty for its nonpayment, and the law being that it is nonenforcible by imprisonment, it is a nullity, as far as practical results are concerned, unless it may be collected by a forced sale. And we will not give such a construction to the law, if it is not reasonably susceptable of any other.

People v. Brown, 113 Cal., 35; 45 Pac., 181.

The same principle is recognized in the case of Howard v. Fuller, 100 Ky., 148; 37 S. W., 585, and in Huddleson v. Ruffin, 6 O., St. 604.

In the case of Ex parte Dickerson, 30 Tex., App. 448, 17 S. E., 1076, it was objected to the validity of a judgment in a criminal case imposing a fine and imprisonment, that the judgment was void for the reason that it did not provide for execution. In holding the judgment valid the court said:

"The judgment is not only not void, but it is not voidable. The failure of the judgment to order issuance of execution does not detract from its essence of finality. Whether that be embraced in the judgment or not, the judgment is nevertheless a final one, and thoroughly capable of enforcement by means of an execution issued thereunder, or it may be enforced by a capias pro fine, or by both at the same time."

See, also, the case of State v. Terry, 17 S. W., 1075, S. C. Terry v. State, 30 Tex. App. Rep. 408.

II.

A STATUTE THAT PROVIDES, AS PART OF THE PUNISHMENT FOR EMBEZZLEMENT, FOR A FINE FOR THE USE OF THE PARTY WHOSE MONEY OR PROPERTY HAS BEEN EMBEZZLED, IS NOT UNCONSTITUTIONAL FOR THE REASON THAT IT MAKES THE AMOUNT OF THE FINE EQUAL TO DOUBLE THE AMOUNT OF MONEY OR PROPERTY EMBEZZLED.

In considering a Missouri statute imposing upon railroads the duty of fencing their right-of-way, and in the event of omission, authorizing the assessment of double damages, the Supreme Court of the United States says:

"The statutes of nearly every state of the union provide for the increase of damages where the injury complained of results from the neglect of duties imposed for the better security of life and property and make that increase in many cases double, in some cases treble, and even quadruple the actual damages. And experience favors this legislation as the most efficient mode of preventing, with the least inconvenience, the commission of injuries. The decisions of the highest courts have affirmed the validity of such legislation."

Mo. Pac. Ry. C. v. Humes, 115 U. S., 512; 6 Sup. C., 110; 29 L. Ed., 463.
Minneapolis & St. L. Ry. C. v. Beckwith, 129 U.S., 26; 9 Sup. Ct., 207, 32 Law Ed., 585.
Mier v. Phillips Fuel Co., 107 N. W., (Iowa) 621.

"Code, Art. 2485, making any operator of a mine taking coal without permission from adjoining land liable in double damages therefor, is not violative of the fourteenth amendment to the federal constitution, prohibiting any state from depriving any person of property without due process of law, or depriving anyone within its jurisdiction of the equal protection of the laws."

Mier v. Phillips Fuel Co., 107 N. W., (Iowa) 621.

III.

The construction of a state statute and its effect upon sheriff's sale of land as determined by the highest court of a state, is conclusive upon the federal court as to the land in that state.

Henry v. Pittsburg Clay Mf'g Co., 80 Fed. Rep., 485.

The fifth amendment of the federal constitution was intended to operate as a restraint on the exercise of power by

the federal government only, and has further no application to this case. This proposition has been laid down by the courts in a long series of cases

See Twitchell v. Commonwealth, 7 Wall, (74 U. S.) 321, 19 L. Ed., 223.

In the case of Fayerweather v. Ritch, 91 Fed., 721, the second paragraph reads as follows:

"A party who has had a trial in a state court in accordance with the settled course of the judicial procedure, and has been heard in two successive appeals from the decree therein, cannot claim to have been deprived of property or rights without due process of law."

In the case of Stevens v. City of Kansas City, 146 Mo., 460; 48 S. W., 658, in holding a law providing for an appeal from the police court to the criminal court in a certain class of cases valid, the court decided that:

"A contention that complainant is about to be deprived of his property without due process of law is untenable when he had his day in court according to the procedure prescribed by law."

As a punishment for crime, a person may be deprived not only of his liberty, but of his property as well. If, for commission of an act prohibited by law, his property may be taken from him, the legislature has authority to prescribe the method by which this may be done—all that is required being that the deprivation be by due process of law. The right to punish by fine and imprisonment seems not to have been doubted in the whole history of the law, and the practice of imposing the

two forms of punishment has been so widely recognized for so long a period to say, now, this may not be done, would result in the overthrow of principles that are elemental in our system of jurisprudence.

"Neither the federal nor state constitutions have made any attempt to define what is 'due process of law' or its equivalent, nor have the courts been able to give a definition covering all possible cases. It has been said that they no longer attempt to define in a few words what is meant by these terms, but are disposed to ascertain their intent and application by the gradual process of judicial inclusion and exclusion as the cases presented for decision shall require, together with the reasoning on which such decisions may be founded."

10 Am. & Eng. Enc. Law, (2 Ed.) 291.

Again it is said:

"As applied to judicial proceedings, the term 'due process of law' means a course of proceeding according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights. It is imperative that there be a court of competent jurisdiction; that the proceeding be regular and appropriate to the question involved; and that the trial be a fair one."

Id. p. 293.

In the case of Parsons v. Russell, 11 Mich., 113; 83 Am. Dec., 728, the court said:

"Whatever may be the difficulty of defining this phrase of the constitution when sought to be applied to other proceedings, when used in relation to those of a judicial character it is evidently, and has been so universally held, intended to secure to the citizen the right to a trial according to the forms of law of the questions of his liability and responsibility, be-

fore his person or his property shall be condemned. Judicial action is in such cases imperatively required, and implies and includes actor, reus, judex, regular allegations, opportunity to answer, and trial according to some settled course of judicial proceedings."

In the case of Carr v. Brown, 20 R. I., 215; 38 Atl., 9, the court said:

"Those rules require that there shall be a court of competent jurisdiction to pass upon the subject-matter of the suit or proceeding, and that there shall be a trial or proceeding in which the rights of the parties, after notice and opportunity to be heard, shall be duly adjudicated."

In the case of Davidson v. New Orleans, 96 U. S., 97, 24 L. Ed., 616, the court held that:

It is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regard the issues affecting it, he has, by the laws of the state a fair trial in a court of justice, according to the modes of proceeding applicable to such a case.

"As we have said on more than one occasion, it may be difficult, if not impossible to give to the terms 'due process of law' a definition which will embrace every permissible exertion of power affecting private rights and exclude such as are forbidden. They come to us from the law of England, from which country our jurisprudence is to a great extent derived, and their requirement was there designed to secure the subject against the arbitrary action of the crown and place him under the protection of the law. They were deemed to be equivalent to 'the law of the land'. In this country the requirement is intended to have a similar effect against legislative power, that is, to secure the citizen against arbitrary de-

privation of his rights, whether relating to his life, his liberty or his property. Legislation must necessarily vary with the different objects upon which it is designed to operate. It is sufficient for the purposes of this case, to say that the legislation is not open to the charge of depriving one of his rights without due process of law, if it be general in its operation upon the subject to which it relates, and is enforceable in the usual modes established in the administration of government with respect to kindred matters, that is, by process or proceedings adapted to the nature of the case."

Dent v. State of W. Va., 129 U. S., 114, 32nd L. Ed., 623, 626.

IV.

THE CONSTITUTIONALITY OF A STATE STATUTE CANNOT BE ATTACKED ON THE GROUND THAT IT IS REPUGNANT TO THE CLAUSE OF THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION PROHIBITING A STATE FROM DEPRIVING ANY PERSON OF PROPERTY WITHOUT DUE PROCESS OF LAW, BY ONE WHO IS NOT THEREBY DEPRIVED OF ANY PROPERTY.

If it be conceded that the defendant-in-error's title under the sale in question is invalid, still the defendant is to be treated, under the deed from Ezra S. Whitney to Sam L. Roberts, through which the defendant claims, as a mortgagee in possession and as such, it may not be divested of such possession until its claim has been satisfied. Consequently until the defendant-in-error's claim is satisfied, the operation of the statute does not deprive the plaintiff in error of any property. The latter is not in a position to complain of the operation of the statute, not only for the reasons set out in

this sub-division of this brief, but also for the reasons given in the next sub-division.

The rule in actions of ejectment where the defendant is a mortgagee in possession, has been stated as follows:

"Both at common law and generally in those jurisdictions where the mortgagee cannot recover possession of the property mortgaged without a foreclosure and sale according to law, the mortgagee or one claiming under him when rightfully in possession of the property mortgaged cannot be divested of such possession, or of any part thereof, until the claim under the mortgage is fully satisfied."

20 Am. & Eng. Enc. of Law, 2nd Ed., 1008.

"A senior mortgagee, acquiring possession by consent of the mortgagor after a foreclosure sale under a junior mortgage before the title and right of possession of the mortgagor have been extinguished by the expiration of the year for redemption, has the rights of a mortgagee in possession."

Jones v. Rigby, 41 Minn., 530, 43 N. W., 390.

In the opinion in this case the court declared that the mortgagee having been let into possession of the mortgaged premises could not be ejected while his mortgage remained unsatisfied.

The Montana statute provides that "a mortgage of realty shall not be deemed a conveyance, whatever its terms, so as to enable the mortgagee to recover the possession of the realty without foreclosure and sale." In the case of Fee vs. Swingly, 6 Mont. 596, 13 Pac. 375, the court decided that notwithstanding the terms of this statute, "where the mortgagor, after the maturity of the mortgage, gives the mort-

gagee permission to enter, the mortgagee may rightfnlly do so, and hold possession until the debt is paid," and that, "in an action of ejectment, defendant, claiming to be a mortgagee in possession under such consent, may introduce the mortgage in evidence as preliminary to show the consent to enter." In this case, the mortgagee, who was in possession under his mortgage, was not divested of possession at the suit of the plaintiff, who was, as the plaintiff, in this case is, the grantee of the original mortgagor. The opinion contains the following language:

"A mortgagee in possession of the mortgaged premises, after condition broken, and with the consent of the mortgagor, is entitled to the possession until the debt is paid. * * * If a mortgagee, with the consent of the mortgagor, after mortgage debt is due, enters into the possession of the property, the mortgagor cannot eject him until the debt is paid. the rule of a mortgagee in possession applies."

In the case of Hubbell v. Moulson, 53 N. Y., 225, it was held that:

"Ejectment does not lie by a mortgagor against the mortgagee in possession so long as the mortgage subsists."

If it may be assumed that the sale of the property in controversy under the execution issued on the fine imposed upon Ezra S. Whitney in the criminal proceeding is invalid, still the county may resist the effort of the plaintiff in error to divest it of the property as a mortgagee in possession of the mortgaged property. The original grantors under whom the plaintiff claims received only a quitclaim deed, which is in

the nature merely of a release, and in any event conveyed only such interest in the land as the grantor had—THAT WAS AN EQUITY OF REDEMPTION AND NOTHING MORE. Moreover the acceptance of a deed of this character is notice to the grantor of the rights of all other persons in the property, whether such rights are disclosed by the record or not.

"A quitclaim deed is defined as a form of deed of the nature of a release."

23 Am. & Eng. Enc. Law, (2 Ed.) 587.

"In form a quitclaim deed is like the common-law release, a derivative or secondary common-law form. In substance it is similar to an original common-law deed, creating an estate and not requiring for its operation any estate in possession or other wise in the grantee. In effect it transfers to the grantee whatever the interest the grantor has in the property described, be it a fee, chattel interest, a mere license, or nothing at all."

9 Am. & Eng. Enc. Law, (2 Ed.) 104.

"It (a quit-claim deed) implies a doubtful title, however, in the party executing it, and such being its character, it should not be held to pass anything more than a doubtful title."

Id. note p. 106, citing Kerr v. Freeman, 33 Miss., 292.

In Byron-Reed Co. v. Klabunde, 108 N. W. Rep., (Neb.) 133, in which case a rehearing was denied Nov. 22nd, 1906, the court holds:

"A purchaser of real estate, who takes by quitclaim deed, takes subject to all existing equities against the grantor."

And in the opinion the court says:

"In conveyances of real estate a quitclaim deed is of it-

self a red light to warn the grantee that the rear end of the transaction is exposed to equities."

In Schmidt v. Musson, 107 N. W., (S. D.) 367, the court says:

"A purchaser from a grantee in a quitclaim deed is not a bona fide purchaser, but takes with notice of outstanding equities."

V.

IF THERE HAD BEEN, PRIOR THERETO, ANY DOUBT AS TO THE VALIDITY OF THE COUNTY'S TITLE TO THE LAND IN QUESTION, THAT QUESTION WAS RESOLVED IN ITS FAVOR BY THE PROCEEDINGS BROUGHT AGAINST JOHN EVERSON FOR DESTROYING THE TIMBER ON THE PREMISES, AND THE MATTER IS ONE THAT HAS BEEN ADJUDICATED.

In Everson v. State, 66 Neb., 154, the main, and practically the only question presented was the ownership of the land in question. This question was decided adversely to Everson, the grantor of the plaintiff in error. The court based its decision upon the validity of the criminal proceedings against Whitney, the sentence, fine, execution, sale, confirmation, and sheriff's deed.

"A judgment between the same parties, in which a claim of plaintiff was decided, or was properly involved and might have been there raised, and determined, is a bar to another action for the same cause.

"The neglect of the plaintiff to avail himself of it furnishes no reason for litigation."

Stockton v. Ford 18 How. (59 U. S.) 418, 15 Law, Ed. 395.

In the opinion the court says:

"The bill filed by the plaintiff to charge the plantation and slaves of the defendant with a judicial mortgage, originally obtained, by one Prior against the firm of N. and E. Ford & Co. The plaintiff claims an interest in this mortgage, first: by purchase on execution against Prior; and second by a trust created in the assignment of the same by Prior, under which the defendant derived title to it." * * * "The defendant, among other defenses, sets up a former suit in bar." * * * .

"One of the questions now sought to be agitated again is precisely the same as this one in the previous suit, namely: The right of the plaintiff to the judicial mortgage under the execution and sale against Prior. The other is somewhat varied, namely: The equitable right or interest in the mortgage of the plaintiff, as the attorney of Prior, for the fees and costs provided for in the assignment to Jones. But this question was properly involved in the former case, and might have been there raised and determined. The neglect of the plaintiff to avail himself of it, even if it were tenable, furnishes no reason for another litigation. The right of the respective parties to the judicial mortgage was the main question in the former suit. That issue, of course, involved the whole or any partial interest in the mortgage. We are satisfied therefore, that the former suit constitutes a complete bar to the present."

In the case of Chapman v. Smith, 16 How, (57 U. S.) 114. 14 L. Ed., 868, which was a suit on a sheriff's bond, the former judgment pleaded was that of an Alabama county court. In the opinion, the court says:

The matters in all three of the breaches were necessarily

involved in the question of due and proper diligence on the part of the sheriff in the execution of the FI. FA. The omission to levy upon the goods, or to sell after the levy, fell directly within the issue and inquiry in that proceeding under the statute; and we are bound to presume were the subject of examination before the court and jury, and were passed upon by them. WHERE THE FACTS IN ISSUE APPEAR UPON THE RECORD, EITHER EXPRESSLY OR BY NECESSARY INTENDMENT * * * THE JUDGMENT IS CONCLUSIVE UPON THESE FACTS, BETWEEN THE SAME PARTIES OR PRIVIES, when properly pleaded.

VI.

"Due Course or Law" simply means that a person should be brought into court and have an opportunity to prove any fact for his protection; the regular course of the administration of the law being through courts of justice by timely and regular proceedings to judgment and execution, according to the fixed forms of law.

Morley v. Lake, etc., 146 U. S., 162; 13 Sup. Ct. Rep, 54.
Murray v. Hoboken Land Co., 18 How,, (59 U. S.) 272; 15 L, Ed., 372.
People v. Essex County, 70 N. Y. 229.
Central Land Co. v. Laidley, 159 . US., 103; 16 Sup. Ct. Rep., 80.

The state court, where the judgment complained of was entered, had jurisdiction to try and determine the guilt of the defendant of the offense charged. He was before the court and had an opportunity to be, and was heard in his defense. The property seized was within the jurisdiction of the state

court. Therefore, the judgment of the state court is conclusive.

Respectfully submitted,

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